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Supreme Court of the United States

OCTOBER TERM, 1945

No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,
Petitioners,

vs.

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHELTON PITNEY,
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Opinions in Courts Below

The opinion of the Circuit Court of Appeals (149 F. (2d) 617) will be found beginning at p. 148 of the Record. The opinion of the District Court (56 F. Supp. 41) will be found beginning at p. 111 of the Record.

The judgment sought to be reviewed, entered on May 9, 1945, will be found at p. 155 of the Record. The Judgment of the District Court, entered on August 7, 1944, will be

found at p. 114 of the Record. The petition for certiorari was filed August 9, 1945.

Jurisdiction

The petitioners seek to invoke the jurisdiction of this Court under Sec. 347 of Title 28 in the United States Code.

Questions Involved

1. Did not the District Court properly assume jurisdiction of a declaratory judgment action because of the alleged intentional and fraudulent tax discriminations for which the law of New Jersey does not furnish an adequate remedy, and thus follow the decision of this Court in *Spector Motor Service, Inc.* v. *McLaughlin, Tax Commissioner*, 323 U. S. 101, which decision had interpreted *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293?

2. Did not the District Court, on the uncontroverted identity of the procedure in this case with the procedure held invalid in *Duke Power Co.* v. *State Board of Taxation*, 129 N. J. L. 449 (Sup. 1943) 30 A. 2d 416, affirmed 131 N. J. L. 275 (E. & A. 1944) 36 A. 2d 201, properly grant a summary judgment on State grounds?

Statement

Respondent brought this suit under the Federal Declaratory Judgments Act (Sec. 274(d) of the Judicial Code, 28 USCA 400) on July 14, 1941, asking for a judgment declaring four assessments wholly invalid and void on various grounds, including the ground that each of the assessments was intentionally and fraudulently discriminatory and as such violative of the Equal Protection Clause of the Fourteenth Amendment and that she was without

adequate remedy therefor under the laws of New Jersey (Par. 41 of the Complaint; p. 32)*, and on the further ground that there had been no compliance with the pertinent part of Sec. 54:3-20, R. S. N. J. 1937, requiring five days' notice in writing, due examination and hearing, and rendition of judgment thereon, where property omitted in the assessment is added after April first of any tax year. See Pars. 7, 28, 29 of the Complaint (pp. 9, 23).

The only material fact in this case is that the procedure followed by the taxing authorities and the tax ferret, one Alfred L. Kirby, who has a contingent interest in any taxes recovered, before the Somerset County Board of Taxation in this case is identical with the procedure followed by these same taxing authorities and this same tax ferret, with a similar contingent interest, before the same Board of Taxation in *Duke Power Co. v. State Board of Taxation*, 129 N. J. L. 449 (Sup. 1943) 30 A. 2d 416, affirmed 131 N. J. L. 275 (E. & A. 1944) 36 A. 2d 201, in which case the highest courts of New Jersey held that assessments based on such procedure were absolutely null and void. This fact has never been controverted by the petitioners and is, in fact, admitted in the Petition at page 13, where petitioners state that the *Duke Power Co. Case* was "under facts almost identical with facts herewith presented." This procedure is fully alleged by Petitioners (see Complaint, Pars. 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28; pp. 15-23) and is admitted by the Answer and therein defended on the basis of petitioners' interpretation of Sec. 54:3-20, R. S. N. J. 1937, which interpretation these same

*Page references are to the Transcript of Record unless otherwise noted.

petitioners were at that time urging on the courts of New Jersey in the *Duke Power Co. Case* and which was completely rejected and repudiated by the highest courts of New Jersey in that case (see Answer, Pars. 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28; pp. 53-5).

This is a litigation solely between Hillsborough Township, having an annual budget for each of the two tax years in question of less than $100,000 (pp. 29-30, 60) and the above-mentioned tax ferret, who has a contingent interest in any recovery (pp. 33-4, 90), and the respondent, a non-resident taxpayer of said Township, whereby said Township seeks to collect additional taxes of over $13,000,000 for said two years (Complaint, Pars. 36-9, pp. 30-1; see also pp. 129-36).

The State of New Jersey would not receive one penny of any tax collected hereunder. *Green* v. *Passaic County Board of Taxation*, 131 N. J. L. 13, 17 (Sup. 1943) 34 A. 2d 245, 247. Moreover, New Jersey by a recent statute (Chap. 163 of the Laws of 1945, approved April 13, 1945) eliminated the old *ad valorem* personal property tax on intangible personal property, thus precluding any similar "tax lightning" attempts on that type of property. The decision in this case, therefore, sets no precedent of future import.

ARGUMENT

I. The Federal Jurisdiction

It is now well settled that in a declaratory judgment action dealing with State taxes Federal Courts shall entertain or deny jurisdiction upon established equitable principles. See: *Great Lakes Dredge & Dock Co.* v. *Huffman*,

319 U. S. 293; *Spector Motor Service, Inc.* v. *McLaughlin, Tax Commissioner*, 323 U. S. 101.

In the latter case, relied on by the Court below but not called to this Court's attention by petitioners' Brief, which was a suit for a declaratory judgment with injunction in a United States District Court to declare void or inapplicable certain Connecticut taxes, the opinion by Mr. Justice Frankfurter said:

> "The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate despite the Johnson Act * * * and *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 87 L. ed. 1407, 63 S. Ct. 1070, because of the uncertainty surrounding the adequacy of the Connecticut remedy."

The *Great Lakes Case* had plainly indicated that the construction placed upon it by the *Spector Motor Service Case* was that intended, as that opinion said:

> "Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds. The Declaratory Judgments Act was not devised to deprive courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles" (319 U. S. at 300).

The charges of intentional and fraudulent discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, set forth in Pars. 41-2 of the Complaint (pp. 32-4), that plain-

tiff was singled out "for a method and basis of taxation different from that accorded other taxpayers", in that the four assessments are entirely on intangible personal property alleged to be owned by the respondent individually and as Trustee, and that those charged with the duty of assessing in said County and Township "have consistently, systematically, intentionally and notoriously failed to assess at true value, or at all, the intangible personal property owned by taxpayers" for the tax years in question, bring this case squarely within that class of cases cited by Chief Justice Hughes in *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 28-9, where it was said:

> "It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. *Sunday Lake Iron Co.* v. *Wakefield Twp.* 247 U. S. 350, 62 L. ed. 1154, 38 S. Ct. 495, *supra*; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. ed. 340, 28 A. L. R. 979, 43 S. Ct. 190, *supra*; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 52 L. ed. 78, 28 S. Ct. 7, 12 Ann. Cas. 757, *supra*; *Chicago G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. ed. 183, 45 S. Ct. 55, *supra*."

In an unbroken line of opinions, dating back as far as 1856, of which the latest are *Royal Mfg. Co.* v. *Board of Equalization of Taxes*, 76 N. J. L. 402, 404-5 (Sup. 1908), 70 Atl. 978, affirmed 78 N. J. L. 337, 338 (E. & A. 1909), 74 Atl. 525, *Pennsylvania Coal Co.* v. *Saddle River*, 96 N. J. L. 40, 43 (Sup. 1921), 114 Atl. 157, 158, *Hackensack Water Co.* v. *State Board (Woodcliffe Lake)*, 104 N. J. L. 48, 49-50 (Sup. 1927), 139 Atl. 410, 411, and

Lehigh Valley R. R. Co. v. *State Board*, 12 N. J. Misc. 673, 675 (Sup. 1934), 174 Atl. 359, 360, the courts of New Jersey have held that a taxpayer who has been singled out for discriminatory taxation under the General Tax Act is restricted to statutory proceedings against the other members of his class for the purpose of raising them to his level, that he may not obtain a reduction of his own assessment to the level of the assessments imposed upon other taxpayers of his class, and in the trial of his own tax appeal may not even introduce evidence of the discrimination. Accordingly, we have the very situation of intentional and fraudulent discrimination without adequate remedy presented to this Court in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441. See, also: *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23; *Iowa-Des Moines Natl. Bank* v. *Bennett*, 284 U. S. 239.

The case of *Central R. Co.* v. *Martin, State Tax Commissioner*, 112 N. J. L. 5 (E. & A. 1933); 169 Atl. 489, relied on by petitioners, is not in point. It involved no claim of discrimination within a single class of taxpayers. It did not arise under the General Tax Act and involved no question of confining the taxpayer to proceedings against his fellow taxpayers under R. S. N. J. 54:3-21. It was decided before *Lehigh Valley R. R. Co.* v. *State Board*, *supra*, and the opinion in that latest pronouncement was written by the *same* Justice who wrote the *Central R. Co.* v. *Martin* opinion relied on by petitioners. That Justice in writing his later opinion (which arose under the General Tax Act because the particular property taxed was not used for railroad purposes) did not cite his earlier opinion in the *Central R. Co.* v. *Martin Case* (which arose under the Railroad Tax Act). On the contrary, he cited the

Royal Mfg. Co. Case as having "established" the New Jersey law and with *Hackensack Water Co.* v. *Woodcliffe Lake, supra,* as being "controlling", in spite of the *Sioux City Bridge Co. Case*.

II. The Decision on State Grounds

The Federal equity jurisdiction existing by reason of the tax discrimination without adequate New Jersey remedy therefor gave the District Court the right and duty of disposing of this case on a well settled ground of State law rather than Constitutional grounds and the argument of petitioners (Brief in Support of Petition, p. 18), that the District Judge in deciding the case on State grounds "conceded that, therefore, it was apparent that there was an adequate state administrative and legal remedy," runs squarely counter to the established principles of equity, as set forth in the cases cited below.

In *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191, a Federal suit in equity to enjoin State rates on the ground that they were unauthorized by the State and violated the Federal Constitution with no adequate remedy therefor, the Court held that these allegations gave Federal equity jurisdiction and thereby

> "the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

In *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 387-8, Chief Justice (then Mr. Justice) Stone said:

> "As our decision in these cases turns on the construction and application of the state law, we do not pass upon the constitutional questions raised. [Citing cases.] They are, however, questions of substance and sufficient to give the court jurisdiction to pass on the whole case. [Citing cases.]"

See, also: *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 508; *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U. S. 94, 97-8; and *Meredith* v. *City of Winterhaven*, 320 U. S. 228, 237 (a declaratory judgment action).

The opinion of the Circuit Court of Appeals by Goodrich, J., properly held:

> "The plaintiff's complaint alleged facts which showed a violation of the right set out by the Supreme Court in the *Sioux City Bridge case*. Appeal to the state courts, as shown in the state decisions cited, shows that such appeal would be unavailing to protect a constitutional right. Under those circumstances, the state procedure is not speedy, efficient or adequate. *Union Pacific Railroad Company* v. *Board of County Commissioners of the County of Weld, State of Colorado, et al.*, 247 U. S. 282 (1918); *Dawson, Attorney General of the State of Kentucky et al.*, v. *Kentucky Distilleries & Warehouse Company*, 255 U. S. 288 (1921). We conclude that the jurisdiction of the federal court in a declaratory judgment suit was properly invoked. See *Spector Motor Service* v. *McLaughlin, Tax Commissioner*, [323] U. S. [101], 65 Sup. Ct. Reporter 152 (1944).
>
> "The point upon which the plaintiff won, in the District Court, was not the constitutional question, but that of the invalidity of the assessment under New Jersey law. This is shown in the plaintiff's motion for judgment and the opinion of the court

> in granting it. Since the foundation for federal jurisdiction existed, however, that jurisdiction continued for the settlement of the controversy 'even though [the court] * * * decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only'. *Siler et al. v. Louisville & Nashville Railroad Company*, 213 U. S. 175, 191 (1909)"; (citing other cases referred to above) 149 F. (2d) 620.

For its affirmance of the District Court's judgment that "The said resolutions and subsequent proceedings thereon by the Township of Hillsborough are therefore null and void" the Circuit Court of Appeals relied on New Jersey law as interpreted in the decision in *Duke Power Co. v. State Board of Tax Appeals*, 129 N. J. L. 449 (Sup. 1943) 30 A. 2d 416, affirmed 131 N. J. L. 275 (E. & A. 1944), 36 A. 2d 201, which case petitioners admit was "under facts almost identical with facts herewith presented" (Petition, p. 13). That case was decided by the Supreme Court in an opinion by Mr. Justice Bodine and affirmed in the Court of Errors and Appeals "for the *reasons* expressed in the opinion by Mr. Justice Bodine in the Supreme Court" (italics supplied). These reasons were expressed by the conclusion of the opinion, as follows:

> "Since the property assessed was not subject to taxation and since the procedure before the State Board was no substitute for a proper proceeding before the County Board, the assessment is set aside and the judgment is reversed" (129 N. J. L. 457, 30 A. 2d 420);

thus clearly basing the decision both on an improper proceeding before the County Board and on the tax exemption.

And of course he had a perfect right to thus base his decision on two grounds. See *United States of America v. Title Ins. & Tr. Co.*, 265 U. S. 472, 486; and cases there cited.

As Judge Goodrich said (149 F. (2d) 621):

> "We see not the slightest reason for supposing that the Court did not mean just what is said when it rested its decision on both points."

The fact that this decision was squarely based on the improper procedure before the County Board makes untenable petitioners' contention (Brief, p. 33 et seq.) that that portion of the opinion of the New Jersey Supreme Court dealing with the so-called remedial statutes (R. S. N. J. 54:4-58.9) was dictum, as obviously the Court could not have thus based its decision had it considered the remedial statutes applicable. This is further shown by the fact that the Court overruled the holding by the State Board of Tax Appeals (*Duke Power Co.* v. *Hillsborough Township*, 20 N. J. Misc. 240 (1942), 26 A. 2d 713) that these remedial sections were applicable, and in so doing said:

> "* * * the remedial statutes we do not find to have been a substitute for proper assessment. * * * they do not apply where the statute for the addition of property omitted from the assessment is not complied with." (129 N. J. L. 449, 457, 30 A. 2d 416, 420).

Petitioners' contention that the New Jersey Courts erred in holding the remedial sections inapplicable and in overruling the State Board on that point is obviously unavailing, as even if the State Courts had failed to follow earlier State precedents, which we strenuously deny, neither the District Court nor the Circuit Court of Appeals could have

disregarded the latest pronouncement of the highest court of New Jersey on a case on all fours with the case before them. *Erie R. R.* v. *Tompkins,* 304 U. S. 64. The argument advanced by petitioners here is exactly the same argument advanced by this same Township in the *Duke Power Co. Case* and rejected by the New Jersey Courts. The authorities relied on by the petitioners are the same authorities relied on for that purpose in the *Duke Power Co. Case,* where they were wholly uninfluential. They are distinguished by their facts and fall outside the long established rule that the remedial statutes do not apply to give life to assessments found to be absolutely void *ab initio* (*App* v. *Stockton,* 61 N. J. L. 520 (Sup. 1898); *Canda Mfg. Co.* v. *Woodridge,* 58 N. J. L. 134 (Sup. 1895); *Peckham* v. *Newark,* 43 N. J. L. 576 (Sup. 1881); *Mitsch* v. *Township of Riverside,* 86 N. J. L. 603 (E. & A. 1914), 92 Atl. 436; *Shillingsburg* v. *Township of Greenwich,* 83 N. J. L. 179 (Sup. 1912), 83 Atl. 644) and does not operate to confer original power to tax or assess. See: *Reynolds* v. *Paterson,* 49 N. J. L. 380 (Sup. 1887); and *Oradell* v. *State Board,* 125 N. J. L. 37 (E. & A. 1940), 13 A. 2d 479, where the Court said (125 N. J. L. at p. 40, 13 A. 2d at p. 480):

> "If, for lack of jurisdiction, the County Tax Board could not lawfully proceed to hear and determine the cause on the merits, so also was the State Board of Tax Appeals under a like disability."

Mr. Justice Bodine's reason for holding void the identical procedure utilized before the County Board in the *Duke Power Co. Case* was stated by him in the following language:

> "The procedure adopted in this case was not in accordance with the statute. Property omitted by

> the assessor must be added before April 1st, so that the rate of taxation may be determined. Thereafter, the addition of property omitted from the assessment must be in accordance with the part of the statute first [*] quoted. *Mitsch* v. *Riverside*, 86 N. J. L. 603; *Shillingsburg* v. *Greenwich*, 83 Id. 129." (129 N. J. L. 455, 30 A. 2d 420).

And it is admitted by the Answer that the assessments in question were made after April first of each of the tax years in question and that that part of the statute which Mr. Justice Bodine said must be followed after that date was not followed in the instant case and the five days' notice, due examination and hearing, and judgment rendered within ten days after the hearing were not granted to the plaintiff herein. See Answer, Pars. 17, 18, 19, 20, 21, 22, 23[**], 24, 25, 26, 27, 28, 29, 34; pp. 53-6, 60.

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[*] The part of the statute first quoted was quoted in the opinion as follows, with the italics supplied by the Court:

"On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on *five days'* notice in writing to the owner by the party complaining, and after *due examination and hearing*, may enter the omitted property on the duplicate *by judgment rendered within ten days* after the hearing * * *. *Such proceeding may be brought within one year from the date when taxes on real property become a lien.*"

[**] Petitioners' allegation in Par. 23 of Answer that "plaintiff, through her counsel, did appear at the meeting of the Somerset County Board of Taxation" has been repudiated by admission of counsel: "The Respondent did not appear at this meeting, but instituted the declaratory judgment action on that day"; and "The Respondent in this case did not attend at the hearing of the County Tax Board subsequent to the receipt of certified copies of the resolutions levying the tax"; Petition and Brief in support, pp. 5 and 42.